A. SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

A-2619-94T2

Gloria Byrne Alfieri and
Vincent Alfieri,
Plaintiffs-Appellants

v.

M. F. Smith & Associates, Inc., and
Michael F. Smith
Defendants-Respondents

On appeal from Superior Court, Law Division, Hunterdon County

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Submitted November 22, 1995 - Decided December 8, 1995

Before Judges King and Landau.

PER CURIAM

The sole issue involved in this appeal by Plaintiffs Gloria Byrne Alfieri and her husband Vincent Paul Alfieri is whether their proposed amended complaint asserted sufficient basis to constitute the "special grievance" necessary to sustain a

"malicious prosecution"[2] claim against defendants M. F. Smith & Associates, Inc. and Michael F. Smith ("Smith") arising out of a counterclaim filed by Smith in an earlier action between the parties.

We have reviewed carefully the briefs and appendices and conclude that the order of December 15, 1994, which denied plaintiffs' motion for leave to file a second amended complaint with prejudice, should be affirmed substantially for the reasons stated by Judge Herr in her written opinion appended to the order. See also *Penwag Property Company v. Landau,* 148 *N.J. Super.* 493, 500 (App. Div. 1977), *aff'd.* 75 *N.J.* 595 (1978), and the authorities cited therein at 501. In *Giri v. Rutgers Casualty Ins. Co.,* 273 *N.J. Super.* 340 (App. Div. 1977), *certif. denied* 139 *N.J.* 185 (1994), we recently addressed again the scope of the "special grievance" as it is interpreted in this jurisdiction. As we indicated in *Giri*, New Jersey has not joined with those jurisdictions that embrace emotional distress and its consequences in satisfaction of the element of special grievance. *Id.* at 347. *Compare Restatement (Second) of Torts* P.677, which was adopted to recognize the view of a substantial minority of jurisdictions including this and neighboring states. *See also* 3 J.D. Lee & Barry A. Lindahl, *Modern Tort Law: Liability & Litigation,* P. 40.04 revised ed. (1994).

A comprehensive analysis of the considerations favoring retention of a modified form of the "English Rule" of special injury [i.e., special grievance] has been set forth in *Friedman v. Dozorc,* 312 *N.W.* 2d 585 (Mich. 1981). As in Michigan, we seek to balance the risk of chilling free access to the courts

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[2] As we noted in *Penwag Property v. Landau,* 148 *N.J. Super.* 493, 500 (App. Div. 1977), *aff'd* 75 595 (1978), such an action is more correctly designated as one for malicious *use of process* when it arises out of a civil case.

with the need to deter improper, undue use of that right. New Jersey has acted in furtherance of that balance by enacting *N.J.S.A.* 2A:15-59.1, the frivolous lawsuit statute. This does not, however, signal change in the special grievance element required of a claim for malicious use of process. *Venuto v. Carella, Byrne, Bain, Gilfillan, Cecchi, & Stewart, P.C.*, 11 *F.*3d 385, 391-92 (3rd Cir. 1993).

Affirmed.

B. SUPERIOR COURT OF NEW JERSEY LAW DIVISION

[Filed December 19, 1994]

HNT-L-793-92

Gloria Byrne Alfieri and
Vincent Alfieri,
Plaintiffs

v.

M. F. Smith & Associates, Inc., and
Michael F. Smith
Defendants

Civil Action

ORDER DENYING PLAINTIFFS' MOTION TO PERMIT FILING OF A SECOND AMENDED COMPLAINT

Before Judge Marilyn Rhyne Herr, J.S.C.

This matter having been opened to the Court on 12/2/94 by James P. Henry, attorney for plaintiffs, Gloria Byrne Alfieri and Vincent Paul Alfieri and defendants, M.F. Smith & Associates, Inc. and Michael F. Smith, through their attorneys, Norris, McLaughlin & Marcus, having opposed the motion, and the Court having read and considered the papers submitted

in support of and in opposition of the motion and the oral argument of counsel, and good cause having been shown,

It is on this 15th day of December, 1994,

1. ORDERED that plaintiffs' motion to permit the filing of a second amended complaint be and the same is hereby denied with prejudice; and it is

2. FURTHER ORDERED that a copy of this Order shall be served upon all counsel within seven (7) days of the filing date hereof.

/s/ Marilyn Rhyne Herr, J.S.C.

Contested

THIS ORDER/JUDGMENT DISPOSES OF ALL CONTENTIONS AND CLOSES THE CASE.

*See attached Statement of Reasons.

ALFIERI v. M.F. SMITH & ASSOCIATES, INC.

HNT-L-793-92

STATEMENT OF REASONS

This is plaintiffs Gloria Byrne Alfieri's and Vincent P. Alfieri's motion to permit the filing of a second amended complaint. For the reasons stated herein, the motion must be denied. The facts are as follows. Plaintiffs were previously employed by defendant M.F. Smith & Associates, inc. (MFS), and specifically, Michael F. Smith (Smith). The employment was regulated by written contract. On October 2, 1991, Gloria Alfieri's employment was terminated. On November 8, 1991, she filed a demand for arbitration pursuant to her contract. On November 26, 1991, Smith and MFS filed a counterclaim. The matter was arbitrated from May to November of 1992. It was declared closed by A.A.A. on February 17, 1993, and an award was made a month later. Gloria Byrne Alfieri filed a complaint alleging fraud on November 4, 1992, against MFS, Smith and other people and entities. Eventually, Vincent Alfieri joined his wife as a plaintiff.

On April 16, 1993, the Complaint was dismissed without prejudice, for failure to state a claim upon which relief could be granted. The dismissal was without prejudice to plaintiffs bringing possible causes of action for malicious prosecution and/or frivolous litigation if such relief were unavailable through arbitration. On April 21, 1993, the Court explained its reasons for the April 16, 1993, Order.

Plaintiffs now move to assert the claim allowed by the April 16, 1993, Order. They contend they can prove the elements of malicious prosecution: (1) the action was brought without probable cause; (2) it was actuated by malice; (3) it has been terminated favorably to the plaintiff; and (4) the plaintiff

suffered a special grievance. *The Penwag Property Company v. Landau,* 148 *N.J. Super.* 493, 500 (App. Div. 1977), *aff'd.* 75 *N.J.* 595 (1978).

When Ms. Alfieri filed a demand for arbitration, MFS filed an allegedly baseless counterclaim. Plaintiffs claim that when Smith prepared the counterclaim, he knew there was a real and debatable issue as to whether he fired Ms. Alfieri or she quit. He also allegedly knew she had not removed any property from MFS, and that, being unemployed, she could not have violated any restriction on competition. Plaintiffs say that only malice could motivate a counterclaim filed for a sum close to MFS's annual sales, when counterclaimants knew Ms. Alfieri brought in only a small percentage of the company's business. Though Gloria Alfieri did not participate in the hearings, the arbitrator stated:

> "I am not persuaded with respect to the validity of such claim, and I do not find any provision in the agreement between the parties which would furnish a basis for an alleged counterclaim against GBA."

Smith contends that the motion must be denied because plaintiffs fail to state a cause of action.

> "Objection to the filing of an amended complaint on the grounds that it fails to state a cause of action should be determined by the same standard applicable to a motion to dismiss under *R.* 4:6-2(e)."

Comment to *R.* 4:9-1 (quoting *Maxim Sewerage v. Monmouth Ridings,* 273 *N.J. Super.* 84, 90 (Law Div. 1990).

> "On a motion to dismiss under *R.* 4:6-2(e), the inquiry is confined to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim.

> The court may not consider anything other than whether the complaint states a cognizable cause of action. For this purpose, all facts alleged in the complaint and legitimate inferences drawn therefrom are deemed admitted."

Reider v. State Dept. of Transp., 221 *N.J. Super.* 547, 552 (App. Div. 1987) (citations omitted).

Defendant attacks the motion on a number of grounds. The heart of Smith's opposition is that plaintiffs lack two of the four necessary elements of a claim for malicious prosecution: a favorable ruling and a special grievance.

Smith is correct that the latter element is missing. Because the last element is missing, I do not have to address Smith's claim that plaintiff did not recover on counterclaim, but I will for completeness sake. The arbitrator held:

> "I am not persuaded with respect to the validity of such a claim and I do not find any provisions in the agreement between the parties which would furnish a basis for an alleged counterclaim against Gloria Byrne Alfieri. The documents which Gloria Byrne Alfieri is alleged to have removed from the premises of the company and which M.F. Smith & Associates claims were critical to its operation apparently were not so critical since the company did not proceed with due diligence in a legal forum other than these arbitration proceeding to attempt to obtain those documents."

Smith claims that this just means that the arbitration was not the proper forum to address the issues raised in defendant's counterclaim, and says that an arbitrator derives jurisdiction over a case from the parties' contract and the arbitrator here held that the contract at issue did not furnish a basis for defendant's counterclaim. But that is just the point. Smith

brought an action under the contract. He lost that action under the contract. It is of no moment that he may have another claim in another forum. He lost this one. Thus this element is established.

However, plaintiffs have no special grievance. They allege that as a result of the malicious counterclaim, (1) Ms. Alfieri went a severe depression, lost sleep, and could not concentrate; (2) she experienced marital difficulties, had crying spells, and could not eat; and (3) she had begun to market a small business, but could not complete the work and lost the anticipated economic benefit.

None of these losses constitutes a special grievance.

> "A 'special grievance' consists of interference with one's liberty or property, such as the filing of a bankruptcy petition, granting an injunction, filing of a *lis pendens* or wrongful interference with the possession or enjoyment of property." *Brien v. Lomozow,* 227 *N.J. Super.* 288, 303 (App Div. 1988).

Brien involved a doctor allegedly maliciously accused of molestation of patients. He sustained damage to his reputation, and expended substantial amounts of money to defend himself in front of the New Jersey State Board of Medical Examiners. He also suffered extraordinary emotional distress.

Finding the doctor had no cause of action for malicious prosecution, the Appellate Division stated:

> "Plaintiffs mental anguish or emotional distress, purportedly arising from the administrative charges, are not special injuries required to sustain a malicious prosecution action and the same is true of the alleged loss

of reputation which could flow from the mere filing of any complaint." *ID.* at 304 (citations omitted).

Plaintiffs have alleged the deprivation of neither a liberty nor property interest as a result of the counterclaim. The closest they come is the allegation that Mrs. Alfieri's business suffered when she lost her concentration. However, it appears that to have a cause of action there must be a more direct connection between the alleged malicious action and the deprivation. While plaintiffs assert that this defendant caused the Alfieri's pain, the law's disfavor toward malicious prosecution actions, *see id.* at 300 (citations omitted), dictates that they provide more than this to state a claim. Plaintiffs contend that without discovery, they cannot know the full extent of the effect the counterclaim had upon them. But the effects are well documented. The liberty and property interests cognizable under the claim are apparent. If plaintiffs had lost one, they would know it. Therefore the motion is denied and the action is dismissed with prejudice. Any further complaints by plaintiffs must be addressed to the Appellate Division.

C. SUPREME COURT OF NEW JERSEY - ORDER
M-977 September Term 1996

[Filed March 21, 1997]

43,541

Gloria Byrne Alfieri et al.,
Plaintiffs-Petitioners

v.

M. F. Smith & Associates, Inc., et al.,
Defendants-Respondents

ORDER

Before Judge Deborah T. Poritz, Chief Justice

This matter having come before the Court by the filing of a notice of petition for certification from the judgment of the Appellate Division in A-2619-94, and the petitioner having failed to file a timely petition for certification, and good cause appearing;

It is ORDERED that the notice of petition for certification filed in this matter is dismissed for lack of prosecution.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 21st day of March, 1997.

/s/ Stephen Townsend
Clerk of the Supreme Court

D. SUPREME COURT OF NEW JERSEY - ORDER
M-1222 September Term 1996

[Filed May 7, 1997]

43,541

Gloria Byrne Alfieri et al.,
Plaintiffs-Movants

v.

M. F. Smith & Associates, Inc., et al.,
Defendants-Respondents

ORDER

Before Judge Deborah T. Poritz, Chief Justice

This matter having been duly presented to the Court, it is ORDERED that the motion to vacate order of dismissal and reinstate the notice of petition for certification is denied.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 6th day of May, 1997.

/s/ Stephen Townsend
Clerk of the Supreme Court

E. SUPREME COURT OF NEW JERSEY - ORDER
September Term 1997
M-26/27

[Filed September 8, 1997]

43,541

Gloria Byrne Alfieri et al.,
Plaintiffs-Movants

v.

M. F. Smith & Associates, Inc., et al.,
Defendants

ORDER

Before the Honorable Alan B. Handler, presiding Justice

This matter having been duly presented to the Court, it is ORDERED that the motion for leave to file a motion for reconsideration as within time (M-26) is granted; and it is further

ORDERED that the motion for reconsideration (M-27) is denied.

WITNESS, the Honorable Alan B. Handler, presiding Justice, at Trenton, this 4th day of September, 1997.

/s/ Stephen Townsend
Clerk of the Supreme Court